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IN THE

Supreme Court of the United States

October Term, 1964
No. 416

MARY CUNLIFFE TRAUTWEIN, WILLIS HENDERSON, WILLIAM H. KISTINGER, FLOYD H. NORRIS, and JOSEPH C. HECTON,

Appellants,

vs.

THE COMMUNITY REDEVELOPMENT AGENCY OF THE CITY OF LOS ANGELES, CALIFORNIA,

Appellee.

On Appeal From the Supreme Court of the State of California.

MOTION TO DISMISS OR AFFIRM.

Appellee in the above-entitled case moves to dismiss and/or affirm on the following grounds:

1. The federal question sought to be reviewed was not timely or properly raised before the California courts and was not expressly passed on; and

2. The federal question sought to be reviewed is not substantial, and there is no need for argument thereon.

Opinions Below.

The opinion of the California Supreme Court is reported as *In re Redevelopment Plan For Bunker Hill*, 61 Adv. Cal. 1, 37 Cal. Rptr. 74 (1964). The opinion of the California District Court of Appeal is reported as *Community Redevelopment Agency v. Goldman*, 33 Cal. Rptr. 92 (1963). Said opinions are also printed as appendices to the Jurisdictional Statement filed by Appellants herein.

Jurisdiction.

There is a defect of jurisdiction over the subject matter of the question sought to be raised by appellants (collectively referred to herein as "Trautwein") in that Trautwein failed in the California courts to draw into question the validity of California Health & Safety Code §33959 under the Constitution, treaties or laws of the United States as required by 28 U. S. C. §1257(2).

Additionally, Trautwein failed both in the trial court and in the opening and reply briefs on appeal to contend that the action of The Community Redevelopment Agency of the City of Los Angeles, California (the "Agency") in holding the hearing on the tentative plan for the redevelopment of the Bunker Hill area within less than one week after the last publication specified in California Health & Safety Code §33531 was in derogation of any title, right, privilege or immunity of Trautwein under the Constitution, treaties or statutes of the United States as required by 28 U. S. C. §1257 (3). Trautwein did not contend a federal question existed with respect to this publication of notice until it filed its Petition for Rehearing before the California

Supreme Court. Even then, the question there raised did not challenge the validity of §33959. The California Supreme Court denied the rehearing without comment.

The question here presented by Trautwein, even if it had merit, was therefore waived, and was not considered by the California courts. It is therefore submitted that jurisdiction is lacking (*Mutual Life Ins. Co. v. McGrew*, 189 U. S. 291, 307-308; *Michigan Sugar Company v. Michigan*, 185 U. S. 112, 113-114; *New York ex rel. Rosevale Co. v. Kleinert*, 268 U. S. 646, 650-651).

Additionally, the question sought to be presented is utterly lacking in substantiality (*United States v. Heinszen & Co.*, 206 U. S. 370, 383-384, 387; *Mattingly v. District of Columbia*, 97 U. S. 687, 690; *Graham v. Goodcell*, 282 U. S. 409, 429; *Swayne-Hoyt v. U. S.*, 300 U. S. 297, 301-303; *North Laramie Land Co. v. Hoffman*, 268 U. S. 276, 284-286)

Question Presented.

1. Whether Trautwein properly raised and preserved the federal question advanced.

2. Assuming jurisdiction exists, whether the California Legislature may, consonant with the Fourteenth Amendment to the United States Constitution, cure by validating legislation a defect in the amount of elapsed time between the final publication of notice and the holding of a public hearing on a tentative redevelopment plan by a redevelopment agency, where:

> (i) such public hearing was a preliminary matter only, and no order affecting anyone's rights did or could have been made thereat;

(ii) proper notice of such public hearing was mailed to all of the landowners at their addresses as shown on the tax assessor's records;

(iii) another properly noticed public hearing was subsequently held on the tentative redevelopment plan by the City Council; and

(iv) a further public hearing also properly noticed, was held by the City Council on the final redevelopment plan prior to the adoption thereof by said City Council.

Statement of the Case.

On March 31, 1959, the Council of the City of Los Angeles, California (the "City Council") adopted Ordinance No. 113,231 which approved and adopted the Redevelopment Plan for the Bunker Hill Urban Renewal Project 1B (the "Final Plan").

This action culminated a process which began many years earlier, involving the extraordinarily repetitive and complex process then required by California law for the formulation and adoption of a redevelopment plan.

The various steps in this process and the related sections of the California Health and Safety Code requiring them are set out in the petition of the Agency for a judgment validating the Final Plan and the bonds proposed to be issued by the Agency [C. T. pp. 1-12, esp. pp. 1-9]; and in the opinion of the California Supreme Court (*In re Redevelopment Plan For Bunker Hill*, 61 Adv. Cal. 1, 11-16, 37 Cal. Rptr. 74 (1964), Trautwein Juris. St., pp. 14-21).

In essence, those steps were as follows:

1. Formulation of the preliminary redevelopment plan for the Project Area by the City Planning Commission.

2. Formulation of the tentative redevelopment plan (the "Tentative Plan") by the Agency.

3. Public hearing by the Agency on the Tentative Plan.

4. Public hearing by the City Council on the Tentative Plan.

5. Adoption of the Tentative Plan by the City Council.

6. Formulation of the Final Plan by the Agency.

7. Public hearing by the City Council on the Final Plan.

8. Adoption of the Final Plan by the City Council.

Item 3 in the above list is the stage of the proceedings wherein Trautwein claims here to have been deprived of due process of law under the Fourteenth Amendment to the United States Constitution. Under California Health and Safety Code §§ 33530-33533 the Agency was required to conduct a public hearing on the Tentative Plan prior to submitting such plan to the City Council. Pursuant to §33531, the Agency was required to publish notice in a newspaper of general circulation once a week for four weeks prior to such hearing. Publication was made February 28, March 6, March 13 and March 20, 1956, and the hearing was held March 21, 1956 [C. T. pp. 373-374]. Thus, although publication was made in each of four weeks, less than twenty-eight days elapsed between the date of first publication and the hearing. Pursuant

to California Health and Safety Code §33533, the Agency was also required to mail notice of the hearing to each assessee of each parcel in the Project Area at his last known address as shown on the records of the County Tax Assessor. The trial court found that this notice was given in full compliance with the statute [C. T. p. 373].

After the adoption of the Final Plan by the City Council five separate actions were filed by various landowners, including Trautwein, who filed a complaint on June 26, 1959 [C. T. p. 346]. Thereafter, on December 28, 1959, the Agency filed a special proceeding to have the Final Plan and the bonds provided for therein declared valid [C. T. p. 1]. On April 11, 1960 all six of the above actions were ordered consolidated for purposes of trial [C. T. p. 541].

Trautwein did not assert before the trial court that the alleged defect in the publication of notice of the Agency's hearing on the Tentative Plan deprived Trautwein of any rights protected by the United States Constitution. [See C. T. pp. 664-665, wherein the legal issues in dispute between Trautwein and the Agency were set forth, and pp. 665-669, wherein the legal contentions of Trautwein were set forth, in the Joint Pre-Trial Statement of the Agency and Trautwein, which was incorporated into the Pre-Trial Order (C. T. p. 647)].

The trial court held that any defect in the publication of this notice was cured by the provisions of California Health and Safety Code §33959 which provided that in the special proceeding any error, irregularity or omission not affecting the substantial rights of the parties should be disregarded [C. T. p. 389; *In re Redevelop-*

ment Plan For Bunker Hill, 61 Adv. Cal. 1, 24, 37 Cal. Rptr. 74 (1964)].

On appeal, Trautwein contended that the alleged defect in the publication of notice under §33531 was a jurisdictional defect, and that allowing the subsequent proceedings to stand denied Trautwein "due process" (Trautwein Opening Brief below, pp. 3-21). At no time did Trautwein ground this contention upon the Fourteenth Amendment to the United States Constitution. (Passing reference was made to the United States Constitution at pages 4 and 8 of said brief.)

No challenge whatsoever was made in any California court to the validity of California Health and Safety Code §33959 under the United States Constitution (see Trautwein Opening Brief below, esp. pp. 3-21).

Trautwein's Petition for Rehearing before the California Supreme Court did contend that the alleged defect in publication of notice constituted a denial of due process under the Fourteenth Amendment to the United States Constitution (Trautwein Petition for Rehearing below, p. 10). The California Supreme Court, however, denied said petition, and did not expressly pass on the purported federal question (see *In re Redevelopment Plan For Bunker Hill*, 61 adv. Cal. 1, 23-24, 37 Cal. Rptr. 74 (1964)).

California Health and Safety Code §§ 33530-33535, upon which Trautwein's contentions are based, were repealed in 1959 by Stats. 1959, ch. 1102 § 22, p. 3182, as a part of the elimination of the requirement of a tentative plan by the amendment of §33502 and the repeal of §§ 33560-33574 (Stats. 1959, ch. 1102, §22, p. 3178).

ARGUMENT.

A. Trautwein Failed Seasonably to Raise and Preserve the Federal Question Raised in the Trautwein Jurisdictional Statement.

It is well-settled under California practice that unless modified, the Pre-Trial Order in a case controls the issues which may be tried, and that questions not raised in the trial court will not be considered on appeal (Rule 216 (formerly Rule 8.8), Judicial Council Rules for the Superior Courts; *Everly Enterprises, Inc. v. Altman*, 54 Cal. 2d 761, 765-766, 8 Cal. Rptr. 455 (1960); *Baird v. Hodson*, 161 Cal. App. 2d 687, 690, 327 P. 2d 215 (1958); and *Jenner v. City Council*, 164 Cal. App. 2d 490, 498, 331 P. 2d 176 (1958)). This includes constitutional issues (*Hershey v. Reclamation District No. 108*, 200 Cal. 550, 564, 254 Pac. 542; *Jenner v. City Council, supra*).

As stated in 3 Cal. Jur. 2d, Appeal and Error, §140,

> "It is a general rule of appellate review, early established and long adhered to, that questions not raised in the trial court will not be considered on appeal."

The Pre-Trial Order in the Trial Court incorporated the Joint Pre-Trial Statement for the statement of the issues [C. T. p. 647]. The only question raised relating to the publication of notice of the Agency's hearing on the Tentative Plan was the contention merely that § 33531 had not been complied with [C. T. pp. 665, 668-669]. No assertion was made therein that any defect in such publication deprived Trautwein of any rights under the United States Constitution. Further, no assertion was made therein that §33959 was in-

valid under the United States Constitution. No attempt was made by Trautwein to amend the Pre-Trial Order. Therefore, the question Trautwein here seeks to raise was not properly raised in the trial court under California practice.

Trautwein did not assert in its Opening Brief or appeal below that the alleged defect in publication violated any rights of Trautwein under the Fourteenth Amendment of the United States Constitution, and did not contend that §33959, as applied by the Trial Court was invalid under the United States Constitution (Trautwein Opening Brief below, pp. 3-21).

Trautwein's failure to assert these questions in the opening brief on appeal, under long-settled California practice, was a waiver and abandonment of the issues, and such issues would not be considered by the California appellate courts (*Roberts v. Krafts*, 141 Cal. 20, §5, 75 Pac. 281 (1903); *Mayne v. San Diego Ry. Co.*, 179 Cal. 173, 179, 175 Pac. 690 (1918); *Wheeling v. Financial Indemnity Co.*, 201 Cal. Aff. 2d 36, 44-45, 19 Cal. Rptr. 879 (1962)), and were not considered (*In re Redevelopment Plan For Bunker Hill*, 61 Adv. Cal. 1, 23-24, 37 Cal. Rptr. 74 (1964)).

Trautwein did assert in the opening brief that the alleged defect in publication deprived her of "due process". However, since the California Constitution also contains a due process clause (Calif. Const. Art. I, §13), this reference is presumed to refer to California law and the California Constitution (*Miller v. Cornwall R.R. Co.*, 168 U. S. 131, 134; *Harding v. Illinois*, 196 U. S. 78; *Bowe v. Scott*, 233 U. S. 658, 664-665; *Thomas v. Iowa*, 209 U. S. 258, 263).

The failure to raise the federal question set forth in Trautwein's Jurisdictional Statement in the trial court was fatal to jurisdiction in view of California practice (*Bailey v. Anderson*, 326 U. S. 203, 206-207; *Mutual Life Ins. Co. v. McGrew*, 188 U. S. 291, 308).

Similarly, the failure to raise the question before the California appellate courts creates a fatal jurisdictional defect (*Hulbert v. Chicago*, 202 U. S. 275, 280-281; *C. I. O. v. McAdory*, 325 U. S. 472, 477).

The total failure to raise the question before the California courts defeats jurisdiction (*Mutual Life Ins. Co. v. McGrew*, 188 U. S. 291, 307-308; *Beck v. Washington*, 369 U. S. 541, 549-552; *Michigan Sugar Co. v. Michigan*, 185 U. S. 112, 113-114; *California Powder Works v. Davis*, 151 U. S. 389, 393).

The passing references to the United States Constitution in Trautwein's brief was not sufficient to raise a federal question (*Michigan Sugar Co. v. Michigan*, 185 U. S. 112, 113-114; *Herndon v. Georgia*, 295 U. S. 441, 442-443; *Clarke v. McDade*, 165 U. S. 168, 172; *Harding v. Illinois*, 196 U. S. 78, 85).

Additionally, were this reference sufficient, the question which would have been raised is not the question here advanced, therefore no jurisdiction would exist (*New York ex rel. Rosevale Realty Co. v. Kleinert*, 268 U. S. 646, 650-651; *Whitney v. California*, 274 U. S. 357, 362-363; *Adler v. Board of Education*, 342 U. S. 485, 496).

It is submitted that no basis for the exercise of jurisdiction by this Court is present upon the record herein.

B. The Question Raised by Trautwein Is Totally Lacking in Substantiality in That the Allegedly Defective Publication Related to a Hearing Which Was Preliminary to Two Further Hearings, Resulted in No Order Affecting Anyone's Rights, and Was Not to Be Accorded Finality.

Trautwein contends that the fact that less than one week elapsed between the fourth weekly publication of notice of the first of three hearings and the hearing, created a defect amounting to denial of due process of law under the Fourteenth Amendment to the United States Constitution; and that California Health and Safety Code §33959, a curative act, is likewise unconstitutional when applied to cure such defect.

In considering this contention, the following should be noted:

1. Two concurrent methods of notice were provided for, one by publication and the other by mailing. Notice was properly mailed to the assessee of each parcel at his last known address as shown on the County Tax Assessor's records [C. T. p. 373].

2. The prejudice which Trautwein claims to have suffered by reason of the alleged defect in the length of the publication period is that Trautwein was thereby precluded from presenting an alternative plan (*In re Redevelopment Plan For Bunker Hill*, 61 Adv. Cal. 1, 23, 37 Cal. Rptr. 74 (1964)).

3. However, the California law required that alternative plans be received and considered at both the City Council public hearing on the Tentative Plan (California Health and Safety Code §§ 33565-33568), and at the City Council public hearing at the Final Plan (California Health and Safety Code §33730).

4. Trautwein never contended to have an alternative plan to submit (see Trautwein Opening Brief below, pp. 3-21; *In re Redevelopment Plan For Bunker Hill*, 61 Adv. Cal. 1, 24, 37 Cal. Rptr. 74 (1964)), and counsel for Trautwein below attended the City Council public hearings on both the Tentative Plan and the Final Plan without submitting an alternative plan [Agency Ex. 24a, 24b, 39.1-39.27] and without raising any objection as to the publication of notice of the Agency's hearing on the Tentative Plan.

5. After the agency's hearing, the City Council, the body charged with adopting or rejecting the Tentative Plan, held a public hearing thereon after due notice, prior to adopting said Plan, at which all persons desiring to be heard were given a hearing and at which the City Council received and considered all alternative plans submitted [C. T. pp. 375-376].

6. Both the Tentative Plan itself and the Agency's hearing thereon were unnecessary, repetitive and time-consuming steps in the California Redevelopment Law, which could have been, and in 1959, were, eliminated entirely (see Statement of the case).

7. Also subsequent to the hearing in question, the City Council held, after due notice, a public hearing on the Final Plan, at which all evidence for or against the Plan was received and all alternative plans submitted were considered [C. T. pp. 379-380, *In re Redevelopment Plan For Bunker Hill*, 61 Adv. Cal. 1, 16, 37 Cal. Reptr. 74 (1964)].

The basic fallacy in Trautwein's contention is that the Agency hearing on the Tentative Plan (and in fact, the Tentative Plan itself) was not a proceeding which

was to be accorded finality. That is, no final action was to be taken therein, and no rights or property of any persons were or could have been taken from them or affected at said hearing.

The fundamental rule in which Trautwein seeks comfort is by its terms inapplicable here. This rule was stated as follows in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306, at page 314:

> "An elementary and fundamental requirement of due process *in any proceeding which is to be accorded finality* is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Milliken v. Meyer, 311 US 457, 85 l ed 278, 61 S Ct 339, 132 ALR 1357; Grannis v Ordean, 234 US 385, 58 L ed 1363, 34 S Ct 779; Priest v. Las Vegas, 232 US 604, 58 L ed 751, 34 S Ct 443; Roller v. Holly, 176 US 398, 44 L ed 520, 20 S Ct 410." (Emphasis Added.)

This language was quoted with approval and the rule reiterated in *Schroeder v. New York*, 371 U. S. 208, pages 211-212.

In each of these cases, actions were involved out of which would come final orders infringing upon or deciding the rights of affected persons. That situation does not obtain here. The only function of the Agency hearing on the Tentative Plan was to provide a medium for smoothing out the Tentative Plan somewhat prior to the City Council hearing, thereby easing the work of the City Council. The final decision on the Tentative Plan was, of course, made by the City

Council, after a duly noticed public hearing. However, even this decision had no finality since a Final Plan had yet to be formulated, based upon the Tentative Plan, upon which a further public hearing after notice had to be held. Still further, the landowners could contest the matter (1) by an action pursuant to California Health and Safety Code §33746 to challenge the findings and determinations of the Agency and City Council (*In re Redevelopment Plan For Bunker Hill*, 61 Adv. Cal. 1, 18-19, 37 Cal. Rptr. 74 (1964)), (2) by bringing or defending a confirmation action under California Health and Safety Code §§ 33955-33961, or (3) by way of defense to any condemnation action by which the Agency sought to acquire their property (as to condemnation proceedings, see California Code Civ. Proc. §§ 1237-1266.2; *Redevelopment Agency v. Modell*, 177 Cal. App. 2d 321 (1960). And see *Zurn v. City of Chicago*, 389 Ill. 114, 59 N.E. 2d 18 (1945), wherein it was held that due process did not require notice to be given of a redevelopment authority meeting at which the authority determined that an area was blighted and subject to redevelopment, since the landowner could question this in a condemnation action. See also *Rindge Company, et al. v. County of Los Angeles*, 262 U. S. 700, 709, and *Bragg v. Weaver*, 251 U. S. 57, 58).

In other words, the landowners were given three administrative hearings, and thereafter had recourse to the courts by three different routes, before any orders could be forthcoming taking their property. One adequate hearing is all that due process requires (*Pittsburgh, C. C. & St. L. Ry. Co. v. Backus*, 154 U. S. 421, 426-427).

It is submitted that the requirements of notice for purposes of due process under the Fourteenth Amendment to the United States Constitution are wholly inapplicable here because no action to be accorded finality was involved in connection with the Agency's hearing on the tentative plan.

Even were the *Mullane* and *Schroeder* cases applicable, it is submitted that the notice mailed to each assessee of each parcel of land in the area encompassed by the Tentative Plan, at their last known addresses as shown on the County Tax Assessor's records, the giving which notice is not challenged, was fully adequate to satisfy the rule laid down in said cases. This form of notice is exactly that specified in *Schroeder* as the type of notice which should have been given in that case (*Schroeder v. New York*, 371 U.S. 208, 210-211, 214).

From the foregoing, it becomes completely clear that the alleged defect in publication raised by Trautwein is exactly the sort of procedural irregularity which curative acts such as §33959 are designed to correct, and which they have consistently been held constitutionally able to correct (*Mattingly v. District of Columbia*, 97 U. S. 687, 690; *U. S. v. Heinszen & Co.*, 206 U. S. 370, 383-384, 387; *Graham v. Goodcell*, 282 U. S. 409, 429; *Sayne-Hoft v. U. S.*, 300 U. S. 297, 301-303).

It is submitted that California Health and Safety Code §33959 is completely valid as applied by the California Supreme Court, and that Trautwein's contention to the contrary raises no substantial federal question.

C. No Important Question of Federal Law Is Involved Herein.

Trautwein makes no attempt to show how the questions raised in the Jurisdictional Statement herein is of sufficient importance to warrant review by this Court.

The question is a narrow one, involving the particular facts of this case. The peculiar statutory framework out of which the question arose has been repealed. It is therefore unlikely that further similar litigation will result. Additionally, it seems highy unlikely that many cases will arise involving due process with respect to notice of a preliminary hearing, by a body not empowered to take final action, preceding another public hearing to consider a tentative action, which tentative action is to be reworked and then reconsidered at yet another public hearing. To this may be added the further limiting circumstances that the alleged defect involves published notice in a case where notice was also properly mailed to those persons interested.

It is submitted that the question raised by Trautwein has virtually no application to anyone other than the parties to this case, and does not warrant review by this Court.

Conclusion.

Trautwein failed properly to raise and preserve in the California courts the question which is advanced in the Trautwein Jurisdictional Statement, creating a fatal jurisdictional defect.

Additionally, the question raised is completely lacking in substantiality because (1) the allegedly defective publication of notice related only to a preliminary

matter to which no finality was to be accorded and as to which due process would not require any notice, (2) adequate notice was mailed to the landowners at their addresses as shown on the tax assessment rolls, and (3) California Health and Safety Code §33959, as applied by the California Supreme Court, is clearly a valid exercise of the Legislature's power to cure procedural defects in connection with the execution of public projects.

It is respectfully submitted that the Agency's Motion to Dismiss or Affirm should be granted.

Respectfully submitted,

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